

**T.E.C. CONSTRUCTION, INC.****CONTRACT NO. V648C-273****VABCA3965****VA MEDICAL CENTER  
PORTLAND, OREGON**

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**OPINION BY ADMINISTRATIVE JUDGE McMICHAEL**

T.E.C. Construction, Inc. (TEC or Contractor), appeals the decision of the Contracting Officer denying its claim for additional compensation based on an alleged contract ambiguity concerning TEC's responsibility to remove and replace "all" the stainless steel gutters including those at the curved cafeteria/meeting room area of the Nursing Home Care Unit building, and its duty to paint "all" the fascia, as opposed to working on only certain segments or "runs" along the building.

This dispute concerns the use and meaning of certain "notes" and "flag notes" on the Contract drawings. The Contractor posits that it was only required to perform work on segments specifically designated by "flag notes." In contrast, the Government maintains that the text of the notes themselves and the presence of bold and light parallel lines around the perimeter of the building visually depicting the gutter system in issue indicate that the work was not limited to specific segments and encompassed replacing *all* the gutters and painting *all* the fascias that were shown on the Contract drawings.

TEC asserts it was directed to remove and replace segments of stainless steel gutters which were not required to be replaced under the Contract specifications and drawings. The Contractor claims it was also directed to paint certain portions of the fascia which were not required to be painted by the Contract specifications and drawings. As a result of this unanticipated extra work, the Contractor seeks additional costs of \$27,690.

The Record in this Appeal consists of the Appeal File submitted pursuant to Board Rule 4 (R4, tabs 1-19) as supplemented by the Appellant (R4 Supp., tabs 500-01), exhibits introduced by both the Government (Exhs. G-1 through G-11) and the Appellant (Exh. A-1) together with a transcript of the Hearing held in Portland, Oregon (Tr. 1-279). Both parties filed Post Hearing briefs.

**FINDINGS OF FACT**

The Department of Veterans Affairs (VA) issued Solicitation No. 648-93-103 on July 15, 1993, seeking a contractor to: "repair the roof of the VA Nursing Home Care Unit . . . at the VA Medical Center, Vancouver Division . . . in strict accordance with the drawings and specifications." (R4, tab 18) Specific details of work in GENERAL

REQUIREMENTS Section 1.2.A included "removal and replacement of stainless steel gutters, replacement of wood soffits with VA supplied material, replacement of missing or broken rake tile with contractor provided material, cleaning and sealing new and existing soffit material, and all other items as shown by the drawings and specifications." (R4, tab 18) Essentially, there was a continuous run of gutter around the straights, angles and curves of the building except where it was broken in short spans by the rake portion of the roof. The gutter consisted of individual pieces of gutter material soldered together to create long "runs." (Tr. 32) The Contract scope was also set forth in the drawings. (R4, tab 19) Drawing A2, entitled "ROOF PLAN" depicted the gutters with a bold line, showing the building edge, and a lighter line, showing the gutter, running parallel to the bold line. (The building actually contained certain other gutters in the atrium areas which were not depicted on the drawings and which were not the subject of this Contract. Tr. 161-65.) The drawings indicate that when the depicted gutter reached a piece of rake roof, the soldered run of gutter was ended at that location by a detail piece called an "end cap." There were twelve new "end caps" called for in the Contract. (R4, tab 19, Drawing Nos. A2 and A4; tr. 41) Also, at various locations, expansion joints were required to be constructed to allow for hot and cold expansion and contraction of the gutters. New expansion joints were identified by use of the abbreviation "E.J." (Tr. 263) Similarly, new downspouts were called for and identified by the abbreviation "D.S." (R4, tab 19, Drawing No. A2, Note # 1; tr. 40)

Drawing No. A2, provides at Note # 7: "*Remove all existing stainless steel gutter and downspout transition. Replace with new stainless steel gutter and downspout transition. Match existing layout for expansion joints & downspouts . . .*" (Exh. A-1, Drawing No. A2 (emphasis added)) The Drawing then goes on to show "note flags," with a number 7 within a circle, placed at various locations around the building. The dispute centers on the gutters around the rounded cafeteria section, which are shown by the bold/light parallel lines, but for which there is no note flag pointing to that section.

Likewise, Note # 10 of Drawing No. A2 provides: "*Paint all fascias (1) coat semi-gloss sun-proof exterior paint Pittsburgh 7008 'Rome Green No. 78-300 Deep Rustic Base.'*" (Exh. A-1, Drawing A2 (emphasis added)) Similarly, Note # 10 is shown at various locations around the building by the note flag.

By using the notation "(EXISTING TO REMAIN)," in Note #1 of Drawing No. A2, several vents to the roof (VTR), roof drains (RD) and overflow drains (OD) were referenced and identified on the drawing, and the Contractor was instructed that these items were not to be replaced. In a similar vein, specific limited sections where soffits were required to be replaced as set forth in Drawing No. A3, were identified by Note #1 and slashed lines at particular points on the drawing showing a limited and identifiable portion of removal and replacement. (R4, tab 19, Drawing No. A3, Note # 1)

The VA's Contracting Officer on the Project was Edward Bustamante, Jr. and VA engineer, Scott Fisher, was the project engineer. (Tr. 186, 222) Prior to bidding, Larry Adams, TEC's estimator, was responsible for assembling the Contractor's bid. Adams was also TEC's project manager on the construction portion of this job. Prior to bidding he was contacted by the painting subcontractor, regarding some questions that subcontractor had about the painting portion of the work. Essentially, the painting subcontractor questioned whether all, or just the portions of the fascia which were

specifically flagged, were required to be painted. Adams recounted:

We weren't clear -- we were a little confused by the word "all" listed up in the notes and then seeing that the notes didn't really apply to everywhere, and we saw where there could be some confusion brought about by this.

\* \* \* \* \*

Well, [the painting subcontractor] came back to me, and he says, are we painting the whole fascia or not? And I said, wherever there's a note, and he did mention to me he said that, well, it says "all" over here. And I said, well, when you look at the drawing, a Note 7 [sic, Note #10; Note 7 actually refers to the gutter work] points to a little piece of fascia that's only an inch long; there's one note. I said, I assume that means all of that particular run. For example, if you see a Note 7 [sic, Note #10] here, [pointing to a portion of Drawing No. A2] there's a little arrow just pointing. Well, I'm assuming they don't want two inches painted, but they want this whole run painted.

(Tr. 14-15)

Adams testified that he was not confused by this condition, and he was aware of a similar issue with the gutters. He claimed that he did not consider the condition to be a discrepancy or ambiguity in the drawing, but rather, felt that there simply was no work "identified in that particular area of the building." (Tr. 18) Nevertheless, because his painting subcontractor asked him to, Adams sought clarification from CO Bustamante. Adams testified that Bustamante told him that: "he would check it out, but he thought . . . that the intention was to paint them all." (Tr. 20) Adams was unclear about whether CO Bustamante actually called him back and if he did, what the Contracting Officer said. (Tr. 23-24)

CO Bustamante remembered this incident differently and recounted that the discussion concerned whether *all the gutters* were required to be replaced rather than whether all the fascia were required to be painted. Specifically, Bustamante remembers Adams questioning whether the gutters were to be replaced at the rounded cafeteria portion of the building:

Our initial conversation was discussing the fact that there was not a [flag note #]7 indicated around the rounded area. My response to him was . . . that it's probably also included, but I will check with my engineers and let you know. Two, maybe three days later, I returned Mr. Adam's phone call, and I let him know that it was part of the contract.

(Tr. 204) CO Bustamante said that although he informed Adams that all the gutters were part of the Contract, he:

never told him anything about the fascia, because Mr. Adams and I never discussed whether all the fascia were to be painted or not.

(Tr. 189)

CO Bustamante also recollected that a possible amendment was discussed, and he told Adams he would take the need for an amendment into consideration. Ultimately, Bustamante decided the Contract was clear and an amendment was not necessary.

TEC estimator Adams also recalled that he raised the same issue concerning the note flags with Engineer Fisher two days prior to bidding and "he just informed me that we'd have to bid the project the way it is [in the drawings and specifications], because there's not enough time to issue an addendum to clarify this." (Tr. 27, 49) Adams testified that by instructing him to bid it "the way it is," he interpreted that to mean as per the note flags and he did not interpret the rounded cafeteria area to be included. Engineer Fisher remembered the conversation differently, and relating to a question about the gutters: "I remember, I believe, it was Mr. Adams that called me and asked me about the gutters in question, and again, I told him that as I discussed with Ed, the contracting officer, we felt it was in the contract; it was very clear. He asked if [an] amendment was going to come out with that on it, and I explained to him that we felt it was clear that no amendment was needed." (Tr. 224-25)

Award was made in the amount of \$142,500 on September 1, 1993, to TEC, the lowest of four bidders on the Project. (R4, tabs 1 and 2) A Notice to Proceed was issued on September 27, 1993, and provided for completion within 120 calendar days. (R4, tab 4) TEC began work on the Project on October 1, 1993. (Exh. G-5) Shortly thereafter, on October 18, 1993, Adams wrote CO Bustamante that:

Several discrepancies have come to our attention in regards to our roof repair contract . . .

1. Mr. Fisher feels that gutters on the drawings which are not designated with a Note # 7 are to be replaced. TEC feels these gutters need to be added by a mod[ification] to be included.

(R4, tab 5)

Adams wrote CO Bustamante again on October 28, referencing a job site meeting held on October 26 and setting forth a list of deficiencies he asserted were observed that needed "corrective measures." The list of 12 items included:

5. There is no requirement in the contract documents for replacement of the gutters and new membrane placement at the curved area of the building (cafeteria/meeting room). This area has the same problems as the rest of the roof and needs replacement. This area has a larger different shape gutter and fascia trim due to the curve.

\* \* \* \* \*

12. Paint the remaining 1200 l.f. of 1' X 6' fir cvg trim [fascia], not designated as being painted on the contract drawings. (includes new trim in item #11.)

(R4, tab 6)

TEC interpreted the Contract requirements to replace "all" the gutters and paint "all" the fascia to relate only to those particular "runs" or segments of the gutter and fascia specifically identified and pointed to by the note flags and . (Tr. 33, 178-9) TEC claimed that where a note flag pointed to a particular part of the building, it was required only to do work associated with that "run," defining a "run" as beginning at one angle or end of the building and terminating at the adjacent angle or end of the building. (Tr. 15) Using this interpretation, TEC took the position that if a "run" of the building did not have a note flag pointing directly to it, no gutter replacement or fascia painting work was required for that particular "run." Adams elected to interpret the note flag as relating to a "run" as opposed to a three-inch piece directly by the note flag, stating: "[w]hen I saw that word 'all', I interpreted it to mean not just the three-inch section where the arrow's pointing but the whole run, and typically, at these gutters there's a 45 degree at each corner. It's very easy to replace one section of gutter only and leave another and tie them back in, re-solder a joint here." (Tr. 178-79)

TEC, through Adams, provided a cost proposal of \$9,707.25 to demolish "runs" of the old gutter and to supply and install the new gutter it claims was not specified by a note flag. He also sought \$2,550 extra to paint segments of fascia TEC maintained was not required to be painted under the Contract. Finally, Adams proposed that TEC receive a 42 day time extension and be compensated for 6 weeks of increased "on-site exposure" including costs for a supervisor (\$9,600), extra project management (\$1,500), barricade rental (\$180) and Porta-pottie rental (\$150). (Tr. 178-79)

The VA's Engineering Service responded to TEC's October 28 letter, disagreeing with Adams' interpretation that the curved gutter around the cafeteria was not part of the Contract work. (R4, tab 8) On November 16, 1993, CO Bustamante wrote to TEC stating:

In drawing A2, note #7 requires the removal of all existing stainless steel gutters and downspouts and to replace with new stainless steel gutters and downspouts transitions. In addition, on drawing A2, the symbols E.J. and D.S. are indicated on the circular section. Per note no. 1 on drawing A2, E.J. stands for expansion joint and refers the contractor to detail 10/A4. This detail clearly shows a new expansion joint in a new gutter.

(R4, tab 9)

At the end of the construction portion of the job, both CO Bustamante and Engineer Fisher testified that during a meeting, Adams acknowledged that prior to bidding he had

been told that all the gutters were included, but said that since he didn't have an amendment to that effect, he did not put that price into TEC's bid. Bustamante and Fisher stated that in that meeting Adams admitted to them that he elected not to include the gutter work in TEC's bid because he was not sure what the other bidders would do, and he wanted TEC's bid to be under its competitors. (Tr. 190, 225-26) While he recalled the meeting, Adams said he did not recall making such an admission. (Tr. 273-74)

Adams, who has extensive experience in the construction industry, testified that in his experience flags "are used to pinpoint areas where you want work done, and if there's no [flag], then there would be no work in that area, and then to find out what a particular flag means and what it's referencing, you'd go to the note that [it is] taken from." (Tr. 177) Herbert "Buzz" Wallace, an estimator who bid this Project while he was working for another contractor, Select Contracting, testified that he bid the job not including gutter replacement around the curved cafeteria area of the building. (Tr. 47) Wallace also testified that he telephoned both CO Bustamante and Engineer Fisher about whether those gutters were to be replaced, but was not given a definitive answer and was told simply to: "bid the job the way it is, the way it is on the prints, because there's not enough time to issue an addendum." (Tr. 48) Buzz Wallace's son, Rob Wallace, was TEC's site supervisor on this Project. (Tr. 237)

CO Bustamante denied that he talked to Wallace about the Contract and said that he did not discuss gutters with Wallace or any of the other bidders. (Tr. 187, 191-92, 198) The Contracting Officer further denied having any conversations with other bidders, except a "passing conversation" about fascia with a Snyder Roofing representative. (Tr. 198) Engineer Fisher also testified that TEC estimator Adams was the only bidder who asked questions about the gutters. (Tr. 198) He said that Wallace called him twice prior to bidding, but that his questions were about Detail 4 on Drawing No. A4, which did not concern the gutters or fascia. (Tr. 238-39)

To support its position, the Government called Steven J. Kolberg, a consultant architect who was not associated with the design of this Project, but who had almost 20 years experience in the preparation of drawings and projects like the one in issue. (Tr. 109-10, 125) Kolberg testified that he did not see any conflict in the drawings. (Tr. 135) He opined that the "flags in and of themselves did not give an extent of the work" and had to be read in the context of the note which "is the driver, . . . indicates the extent of [the work,]" and is "very, very important." (Tr. 121, 153) He stated that the flags "point to an area of things that need to be done. You couldn't do anything without the note, so the note says, remove all existing stainless steel gutters." (Tr. 121-22) Kolberg concluded that with regard to the drawings in issue, "the flags merely help to reinforce the fact that [the work is] all the way around. . . . The flags are worthless without the note." (Tr. 130-31) Kolberg further explained his analysis of the Contract drawings as they relate to the construction industry practice:

By my thinking and the construction industry's process that goes on every day in the construction industry, these notes read just fine even if you had just one flag, meaning just one note 7 or one note 10, because both notes refer to, and it's very clear, remove all existing in note number 7 and paint all fascia, period. I could not find any other place in the

documents where it called out paint part of, paint 10 feet, paint a portion of, eliminate or delete different parts, so it's very important to correlate the flags with the notes, and by that interpretation, the note says it all. It's fairly clear in saying "all," and I could not find any other place on the documents where it redefined "all."

(Tr. 113-14)

Kolberg did not think TEC's interpretation that the flags referred to a specific limited section was reasonable, and considered it unreasonable for an experienced contractor to expect to put new end caps on old gutters. (Tr. 115, 119) Nor did he consider it typical in the construction industry to put flags all the way around an entire building. (Tr. 120-21) Based on his own design experience, if he wanted to require the removal of only certain portions of the gutters, he would have clarified on the drawings where he did not want the gutters removed. It was "obvious" to him that the VA wanted all the gutters replaced because the wording "all existing" in Note 7, was "all inclusive to [his] way of thinking." (Tr. 136)

Engineer Fisher also opined the Contract "drawings were very clear." (Tr. 255) To him:

Note 7 meant *all* . . . all the gutter [was] to be removed.  
What I would expect to see on these drawings if that stretch of gutter in the circular section was not required, would be a note, a flag on it, which would say NIC, which means "Not In Contract," or somehow have that section identified as not being in the contract.

(Tr. 257) (emphasis added)

Fisher also disagreed with Adams' interpretation that "all" meant a "run" until it reached an angle or end of the building. He concluded:

The note is conclusive as "all." If it was just in a run, what I would expect to see was . . . some line denoting the one end and going up and denoting the other end and then with a note there that says replace. If it said "replace all," then it would be all in that limited area. There would be something denoting the start and end of the area.

(Tr. 258)

Fisher indicated that he had seen drawings where that had been done. Indeed, such identification was used in this Contract at Drawing No. A3, Note #1 where soffits were required to be replaced as set forth in the drawing. There, slashed lines were used at particular points on the drawing showing a limited and identifiable portion of soffit removal and replacement around the building. (R4, tab 19, Drawing No. A3, Note # 1)

Seeking a total of \$27,690.25 and 14 days time extension, TEC submitted a request for an equitable adjustment on January 3, 1994, for "[i]nstallation of extra gutters and tile removal/replacement + new membrane at areas of the building not designated to have gutters/roofing replaced (the circular area), and painting of fascia board at areas not designated to be painted by contract drawings." (R4, tab 14)

CO Bustamante responded by issuing his final decision denying TEC's claim on January 19, 1994, reiterating his position that:

[The circular] section of gutter does not terminate at the end of the curved area but continues at both ends beyond an approximate 90 degree angle for about 9 feet where it ends and where Drawing A2 calls for an end cap to be installed as indicated by symbol 9/A4. At three locations along the circular gutter D.S. appears indicating that downspouts are to be installed and at two locations E.J. appears indicating expansion joints are to be installed. These two symbols appear at all locations throughout the drawings where installation of expansion joints and downspouts are required. It does not stand to reason that end caps, expansion joints or downspouts would be installed on old gutters. Furthermore, the gutter in question is exactly the same age, has deteriorated in the same manner, and has the same problems as the gutters throughout the rest of the building. Also, Note No. 7 on Drawing No. A2 states that the contractor is to remove all existing gutters and replace with new stainless steel gutters and downspout transitions.

(R4, tab 15)

A timely appeal of the Final Decision followed which was docketed as VABCA-3965.

### **DISCUSSION**

TEC contends that because certain "runs" of the building's gutter and fascia shown on Drawing No. A2 did not have the note flags and directed toward them, it was not required to replace the portions of the gutter or paint the portions of the fascia that were not specifically designated or pointed to by those note flags. The Contractor asserts that the directives to replace "all stainless steel gutters" and "paint all fascias" only applied to "runs" of the gutter and fascia which had note flags directed to them. According to TEC, these "runs" begin at one angle or edge of the building and terminate at the adjacent end or angle of the building.

The Government contends that the Note # 7 of that same drawing requires the Contractor to: "[r]emove all existing stainless steel gutter . . . replace with new stainless steel gutter," and Note # 10 requires the Contractor to: "[p]aint all fascias." Asserting that Notes ## 7 and 10 make the Contract scope of work unambiguous, the Government argues that the Contractor is clearly required to replace *all* the gutters and paint *all* the fascia. The Government points out that all the gutter to be replaced, including that at the rounded portion of the building, was identified with a bold and light line, and that gutter



not intended to be replaced (such as that in the atrium areas) was not shown on the drawings. The Government also maintains that there were no indications or limitations whatsoever in the Contract specification or drawings restricting the work to particular "runs" and that the term "all" in the context of Notes ## 7 and 10 should be given its "ordinary meaning" and "meant all" of the gutter depicted on the drawings.

The parties do not dispute that there were certain "runs" of the building, *as defined by TEC*, which did not have note flags specifically directed to them, and in which TEC was required to perform the aforementioned gutter and painting work. However, a coordinated reading of the applicable specifications and drawings gave TEC a complete picture of what was required under this Contract. Pursuant to the Contract specifications and drawings, TEC was required to remove and replace *all* existing stainless steel gutter shown on the drawings and paint *all* the fascia without regard to whether a note flag pointed to a particular part of the building. Likewise, the specifications and drawings contain no limitations on the scope of that work, nor are any qualifications placed upon the term "all." There is no language in the Contract which defines the word "all" as pertaining to a three-inch segment, or for that matter, a particular "run" as defined by the Appellant. Under this Contract, TEC's interpretation, that the term "all" applied only to limited "runs," is simply not reasonable. In this Contract, the term "all" is inclusive absent some limitation